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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER COMPANY,
A BODY CORPORATE,
Petitioner,

v.

THE HONORABLE R. DORSEY WATKINS,
UNITED STATES DISTRICT JUDGE FOR
THE DISTRICT OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on January 7, 1964.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 8a is unreported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 4a is reported in 140 U.S.P.Q. 101, ___ F. 2d ___ (1964).

JURISDICTION

The Order of the Court of Appeals was entered on January 7, 1964 (Appendix B, p. 4a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the case of *Firestone, et al. v. General Tire*, Civil Action 12,932, now pending in the District of Maryland, should be transferred to the Northern District of Ohio because:

(a) Transfer is in the interest of justice and will conserve judicial time; and

(b) The Ohio forum is vastly more convenient for the witnesses; and

(c) The Ohio forum is far more convenient for the parties; and

(d) The Baltimore Court lacks proper venue or jurisdiction of Civil Action 12,932.

2. Whether the United States of America should be made a party in Civil Action 12,932, when complete relief cannot be afforded as between the parties unless joinder is made.

STATUTES AND RULE INVOLVED

The statutes and rule involved (set forth in Appendix A, *infra*) are Sections 1338, 1391(c), 1400(b) and 1404(a) of Title 28 U.S.C., Public Law 87-190, 75 Stat. 418, Public Law 694-716, 64 Stat. 448, and Rule 19(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Subject Matter of this Litigation

Petitioner, The General Tire & Rubber Company, is the owner of United States Patent No. 2,964,0[illegible], applied for in 1950, and issued on December 13, 1960, after extensive and costly litigation against the Commissioner of Patents. *The General Tire & Rubber Company v. Watson*, 125 U.S.P.Q.

628 (1960). Petitioner's patent relates to an enormously valuable and revolutionary invention with respect to pneumatic tires and curable tire tread stock. Petitioner's opponents have asserted in open court that the industry-wide exposure in the United States for infringement of this patent is in the neighborhood of $100,000,000.00.

The Cleveland Litigation

On December 13, 1960, the day the patent was issued, General Tire sued The Goodyear Tire & Rubber Company and The United States Tire & Rubber Company in the District Court for the Northern District of Ohio, at Cleveland, Ohio. That District includes Akron, Ohio, which is known as the tire-producing capital of the world and manufactures approximately one-half of the tires made in the United States.

The Cleveland Court is vastly more convenient for the parties and witnesses in this case. The Northern District of Ohio is the site of the principal place of business for The General Tire & Rubber Company, The Goodyear Tire & Rubber Company, and Firestone Tire & Rubber Company. The McCreary Tire & Rubber Company has its principal place of business in Indiana, Pennsylvania, within the subpoena power of Youngstown, Ohio — a statutory place for the Northern District of Ohio to hold court. Of the 117 witnesses deposed in the United States in both the Cleveland and Baltimore litigations, 55 reside within 100 miles of the Cleveland court and *only 4* minor witnesses reside within 100 miles of Baltimore. Of the 64 witnesses pleaded by Petitioner's adversaries in the Baltimore litigation to show the alleged invalidity of the Petitioner's patent, *only 1* is within the supoena power of the Baltimore court.

The Baltimore Litigation

While seemingly negotiating with Petitioner, Firestone Tire & Rubber Company and McCreary Tire & Rubber Company instituted a declaratory judgment action on March 30, 1961 against Petitioner in Baltimore, Maryland. This suit was instituted more than three months *after* Petitioner sued Goodyear and United States Rubber in Cleveland. Federal jurisdiction is allegedly based on 28 U.S.C. 1338 and 1332.

For approximately the last three years, Petitioner has been litigating two very costly and very complicated cases involving the same patent and substantially the same issues before two District Courts in two separate Circuits. The simultaneous pendency of two "big" cases in separate Circuits has created a most unseemly conflict which has whipsawed Petitioner at every stage of these litigations. Petitioner's adversaries in both Cleveland and Baltimore keep Petitioner's counsel so busy that they cannot adequately prepare for trial and at the same time, make it appear as though we are dragging our feet. Petitioner's adversaries in Baltimore have accentuated the confusion by refusing to agree that discovery proceedings in the Cleveland cases may be used in the Baltimore litigation.

Soon after the Baltimore case was instituted, Petitioner moved for a transfer to Cleveland. The District Court denied the motion, but reserved Petitioner's right to renew it at some future stage of the proceeding. The motion was renewed on September 6, 1963. The District Court denied the motion and on January 7, 1964, the Court of Appeals for the Fourth Circuit refused to issue a Writ of Mandamus to compel transfer.

Joinder of the United States

In both the Cleveland and Baltimore litigations, Petitioner's adversaries have pleaded that they are the re-

cipients of a license to the patent in suit as a result of beir g alleged nominees under contracts between an instrumentality of the United States and Petitioner. The United States has expressly reserved for itself the right to attempt to grant further licensees with respect to the patent in suit and has the statutory power to alter any alleged license. Public Law 694-716, 64 Stat. 448. Should Petitioner prevail in this litigation, the United States may institute proceedings against it to enforce its alleged license for the benefit of Petitioner's adversaries in this litigation. Obviously, unless the United States is made a party, complete relief cannot be afforded as between the parties.

Confronted with the awesome possibility of even further litigation, Petitioner moved under Rule 19(b) for the mandatory joinder of the United States as a party in the Baltimore litigation. Jurisdiction, under Public Law 87-190, 75 Stat. 418, was conceded by the District Court. Nevertheless, on October 14, 1963, it refused joinder, and on January 7, 1964, the Court of Appeals for the Fourth Circuit refused to issue a Writ of Mandamus to compel joinder.

REASONS FOR GRANTING THE WRIT

1. The questions presented by this Petition are clearly of great importance in the administration of the Federal Courts and the Federal Judiciary even apart from their great importance to Petitioner and the entire domestic tire-producing industry. The decision of the lower Court refusing to transfer the Baltimore litigation to Cleveland in which jurisdiction there is now other and older pending litigation involving the same patent and same issues is contrary to the interests of justice and directly contrary to this Court's decision and reasons in support of its decision in *Continental Grain Company v. The FBL-585*, 364 U.S. 19 (1960) where this Court said on page 26:

"To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that §1404(a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers."

2. The complete unwillingness of the lower Court to consider the overwhelming convenience of the witnesses and parties by transfer to Cleveland is without parallel in any reported decision and is directly in conflict with this Court's decision in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), and is directly in conflict with the recent decision of the Fifth Circuit Court of Appeals in *Koehring Company v. Hyde Construction Company*, 324 F. 2d 295 (1963). This Petition involves a grave abuse of the Declaratory Judgment Act whereby an alleged infringer, while seemingly negotiating with the patent holder, institutes a complex and costly litigation in a jurisdiction far removed from the real scene of the battle. Cf. *Kerotest Mfg. Co. v. C-O Two Fire Equipment*, 189 F. 2d 31, 34 (3rd Cir. 1951), *aff'd* 343 U.S. 180 (1952). The Declaratory Judgment Act has been used in this litigation as a tool to attempt to "divide and conquer" Petitioner and prevent it from fairly prosecuting infringers.

3. The decision of the Court below that the District Court had venue of a patent infringement case under Section 1391(c) of Title 28 U.S.C. is erroneous and is directly in conflict with this Court's decisions in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 77 S. Ct. 787 (1957) and *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 62 S. Ct. 780 (1942), and is directly in conflict with the recent decision of the Ninth Circuit Court of Appeals in *Dresser Industries, Inc. v. Smith-Blair, Inc.*, 322 F. 2d 878 (9th Cir. 1963), and is in conflict in principle

with this Court's decision in *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961).

The above cases firmly establish that Section 1400(b) of Title 28 U.S.C. is the *sole* and *exclusive* venue provision for *all* patent infringement cases. Accordingly, the District Court for Maryland did not have venue of the action of McCreary Tire & Rubber Company against Petitioner since it is a conceded fact that if there is venue in the District Court for Maryland, it must be under Section 1391(c).

In contesting the venue question, Petitioner's adversaries have argued that this litigation is not a "patent infringement" case, and therefore, Section 1400(b) does not apply. This is a wholly untenable position, because by arguing this is not a patent case, it would follow that the Baltimore litigation (as opposed to presently enjoined actions against Firestone and McCreary in Cleveland) lacks jurisdiction under the patent suit statute (Section 1338). *Bowers Mfg. Co. v. All-Steel Equipment, Inc.*, 275 F. 2d 809 (9th Cir. 1960) *cert. den.* 363 U.S. 812; *Foster Wheeler Corp. v. Furnace Elec. Co.*, 46 F. Supp. 867, 869 (S.D. N.Y. 1942).

4. The decision of the Court below refusing to join the United States as a necessary party is erroneous and is in direct conflict with this Court's decision in *Ex Parte Connaway*, 178 U.S. 421 (1900) and is in conflict in principle with this Court's decision in *Shields v. Barrow*, 58 U.S. 130 (1854). The decision of the Court below holding that the District Court could use its discretion in determining whether the United States is a "necessary party" is erroneous and is in conflict with the decision of the Court of Appeals for the District of Columbia. *Stevens v. Bartholomew*, 222 F. 2d 804 (1955). The lower Court's reliance on the case of *Curacao Trading Co. v. Federal Ins. Co.*, 137 F. 2d 911, 914 (2nd Cir. 1943) *cert. den.* 321 U.S. 765 (1944) is entirely misplaced since that case involved *permissive*

joinder under Rules 20 and 21 and this case involves *mandatory* joinder under Rule 19(b).

The lower Court's refusal to join the United States may result in further extensive and costly litigation on the part of Petitioner before it may be able to reap the fruits of its patent. The obvious purpose of the party joinder rules is to settle controversies at one time and avoid continual litigation. The failure to join the United States as a party and the failure to transfer the Baltimore litigation to Cleveland is grossly prejudicial to Petitioner's enforcement of its patent.

5. The questions presented by this Petition are of great importance in the administration of the Patent Laws of the United States. To permit infringers to be able to sue the patentee in inconvenient forums and require the patentee to engage in complex and voluminous litigation in separate District Courts will give the infringers an unwarranted procedural advantage. Petitioner merely asks that the Statute of Congress (Section 1404(a)) and the Federal Rules of Civil Procedure (Rule 19(b)) be followed by the District Court so that Petitioner will have its day in Court unhampered by the never ending procedural harassment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN P. RAMSEY,
Attorney for Petitioner.

CHARLES J. MERRIAM,
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February, 1964.

APPENDIX A

STATUTES AND RULE OF CIVIL PROCEDURE INVOLVED

62 Stat. 931, 28 U.S.C. 1338

Patents, copyrights, trade-marks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws.

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62 Stat. 935, 28 U.S.C. 1391(c)

Venue generally

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

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62 Stat. 936, 28 U.S.C. 1400(b)

Patents and copyrights

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

62 Stat. 937, 28 U.S.C. 1404(a)

Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Public Law 87-190, 75 Stat. 418, Section 7

No suit, action, or other proceeding lawfully commenced by or against Federal Facilities Corporation before the dissolution of the Corporation shall abate by reason of such dissolution; but the court may, on motion or supplemental petition filed at any time within twelve months after such dissolution and showing a necessity for the survival of such suit, action or other proceeding to obtain a settlement of the questions involved, allow the same to be maintained by or against the United States in such court. After the dissolution of the Corporation, any suit, action or other proceeding which, but for such dissolution, would be commenced by or against the Corporation, shall be commenced by or against the United States in a Federal court of competent jurisdiction.

Public Law 694-716, 64 Stat. 448

Notwithstanding any other provision of law, the head of any department or other agency in the executive branch of the Government which subsequent to September 9, 1939, entered into any contract or agreement with the holder of any privately owned patent or any right thereunder whereby such holder granted to the United States, without payment of royalty or with reduction or limitation of royalty, any license under such patent or right, is authorized, upon application of the grantor of such license, to enter into such supplemental contract or agreement for the cancellation

of the contract or agreement by which such license was granted as the head of such department or agency shall deem to be warranted by equities existing by reason of changes in circumstances occurring since the granting of such license.

Approved August 16, 1950.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19.

Necessary Joinder of Parties

(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

APPENDIX B

OPINIONS BELOW

United States Court of Appeals
For The Fourth Circuit

No. 9226

The General Tire & Rubber Company,
Petitioner,

versus

The Honorable R. Dorsey Watkins,
United States District Judge for the District of Maryland,
Respondent.

On Petition for Writ of Mandamus

(Argued November 11, 1963. Decided January 7, 1964.)

Before BOREMAN, BRYAN, and J. SPENCER BELL, Circuit Judges.

J. SPENCER BELL, Circuit Judge:

Petitioner, The General Tire and Rubber Company, seeks mandamus against the Honorable R. Dorsey Watkins, United States District Judge for the District of Maryland, to compel him to:

(a) grant petitioner's Rule 19(b) motion to make the United States an additional party, and

(b) grant petitioner's motions to either dismiss for lack of subject matter and venue jurisdiction or transfer the case to the United States District Court for the Northern District of Ohio under the provisions of 28 U.S.C. §1404(a) as the more convenient forum.

A brief history of the proceedings is necessary to understand the actions of the district court.

On March 30, 1961, The Firestone Tire and Rubber Company and McCreary Tire and Rubber Company brought a declaratory judgment action in the district court of Maryland against petitioner, The General Tire and Rubber Company. The plaintiffs sought a declaration of invalidity of patent and noninfringement. Noninfringement was based on the contention that plaintiffs' products were not covered by the subject matter of the patent and that plaintiffs held a royalty free license under the terms of a research contract between General Tire on the one hand and the Reconstruction Finance Corporation and its nominees on the other. Within a week after this suit was filed General Tire sued both Firestone and McCreary for infringement in the district court in Ohio. By July 7, 1961, the court had denied General's motions to dismiss the Maryland suit or transfer it to Ohio and had enjoined General from pursuing the Ohio case. By its answer, General sought to join the United States as an indispensable party, which the court declined to do. As early as July 13, 1962, the court had set a date for completion of the discovery procedure and trial. Having been frustrated in its effort to join the United States in this case, General brought a separate action against the Government in the Maryland district court which was dismissed. On September 6, 1963, General again moved to join the United States as a party defendant and transfer the case to Ohio — the court having again denied the motions, General seeks mandamus.

This record shows that all of the motions embodied in this petition have received consideration by the trial court on more than one occasion during the long history of this litigation. In 1961, the court rejected the transfer motion after it had been briefed and argued at length. The argument that the court lacks jurisdiction to hear the declaratory judgment suit was raised by the answer and rejected by the court early in the case. The court in effect held adversely to petitioner on its Rule 19(b) motion to make the United States a party in April of 1962 when it held that the

United States was not an indispensable party to this suit and again by inference when it dismissed petitioner's separate suit against the United States on the grounds that no justiciable controversy existed between the petitioner and the Government. Now that an extensive amount of discovery has been completed and a firm date fixed for trial of the case on the merits petitioner labors under a difficult burden. Particularly since the passage of 28 U.S.C. §1292(b) has provided the district court with an easily available method of obtaining a preliminary review of these questions early in the history of the litigation, we must assume that the court is strongly persuaded by the wisdom of its action.

In *Holub Industries, Inc. v. Wyche*, 290 F. 2d 852 at 855 (4 Cir. 1961), Judge Soper, speaking for this court and quoting from *American Airlines v. Foreman*, 201 F. 2d 230, 232 (3 Cir. 1953), laid down the rule as to when this court should issue the writ based upon a challenge to the jurisdiction of the district court:

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error."

Applying this rule to petitioner's contention that the court lacked original jurisdiction of the declaratory judgment suit we decline to issue the writ. The cases leave no doubt that a declaratory judgment suit alleging the invalidity of a patent and noninfringement thereof vest subject matter jurisdiction in the court under 28 U.S.C. §1338(a). Petitioner argues that the plaintiffs' pleading of a license estops them to attack the validity of the patent and, therefore, removes the case from the area of patent litigation into the area of contract, thus requiring diversity between the parties for federal jurisdiction. This argument might

bear considerable weight but for the fact that the defendant-petitioner denies the existence of a license. Under these circumstances, we seriously doubt that the doctrine of licensee-estoppel applies. *Davis v. Buck-Jackson Corp.*, 230 F. 2d 655, 657 (4 Cir. 1956).

Having found no unambiguous statutory provision or common-law doctrine which would deny subject matter jurisdiction in the court, we turn to the question of venue jurisdiction. In a declaratory judgment action alleging invalidity and noninfringement venue jurisdiction is controlled by 28 U.S.C. §1391(c) and not by 28 U.S.C. §1400(b). The overwhelming weight of authority is to this effect. *Barber-Green Co. v. Blaw-Knox Co.*, 239 F. 2d 774 (6 Cir. 1957); *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F. 2d 474 (3 Cir. 1942); *E. I. du Pont de Nemours & Co. v. Byrnes*, 101 F. 2d 14 (2 Cir. 1939). This court did not hold to the contrary in *Carbide & Carbon Chem. Corp. v. United States Industrial Chemicals, Inc.*, 140 F. 2d 47 (4 Cir. 1944). There the court expressly refused to rule on venue jurisdiction, holding simply that the district court did not abuse its discretion in refusing to take jurisdiction where a prior suit involving the same issues was pending in another jurisdiction. 28 U.S.C. §1391(c) requires only that the defendant corporation be engaged in business in the district, an admitted fact in this case.

Petitioner's argument that Rule 19(b) leaves no discretion in the trial court to determine whether the United States was in this case a necessary party is likewise without merit. Had the court found the United States to be a necessary party in order to accord complete relief to those already parties then, of course, no discretion is left in the court but to join under the terms of the statute. But, the preliminary question is clearly within the discretion of the court, and at this stage of the proceeding we find no such abuse of that discretion as would justify mandamus. *Curacao Trading Co. v. Federal Ins. Co.*, 137 F. 2d 911, 914 (2 Cir. 1943), *cert. denied* 321 U.S. 765 (1944).

Finally, petitioner contends that the court has abused its discretion in refusing to transfer this case to Ohio

under 28 U.S.C. §1404(a). Reserving the question as to under exactly what circumstances this court would issue a mandamus to compel a transfer, *Cf: Morehead v. Barksdale*, 263 F. 2d 117 (4 Cir. 1959), we have no hesitation in saying that on the state of this record we will not issue a mandamus here. There is no evidence that the Ohio cases can be reached at a definite time in the future, whereas this case is set for a firm date early next year. The court is thoroughly familiar with the issues. More than 25,000 pages of depositions and 18,000 pages of exhibits are in the record. Plaintiffs have been required to answer over 600 interrogatories. This work has proceeded under ground rules laid down by the district judge, who in ten full days of hearing must have acquired familiarity with the details of the case. Under these circumstances the petition will be

Denied.

MEMORANDUM

In the United States District Court
For The District of Maryland

Civil Action No. 12932

The Firestone Tire & Rubber Company and
McCreary Tire & Rubber Company,

v.

General Tire & Rubber Company.

This is an action by plaintiffs for a declaratory judgment that a certain patent of defendant is invalid; or if valid, has not been infringed by plaintiffs; or that if such patent is valid, and otherwise would be infringed, plaintiffs have a license, derived through agencies of the United States.

Defendant moved to dismiss, or, in the alternative, to transfer the case to the United States District Court in Cleveland, Ohio, where defendant had, shortly after the institution of this suit, brought actions for infringement against two tire manufacturers other than the plaintiffs herein. At the time of the hearing of these motions to dismiss or transfer, these two Cleveland actions had not been consolidated, but they have subsequently been consolidated.

The motion to dismiss alleged as one of its grounds that the United States, as the alleged grantor of, or conduit with respect to, the alleged licenses, was an indispensable party. This motion was overruled, as was the motion to transfer to Cleveland, Ohio. As to the latter motion, the court ruled in substance that the plaintiffs, in a properly filed suit, in general had the right to maintain such litigation in the elected forum, in the absence of a substantial showing of forum non conveniens. The court found that in fact the District of Maryland seemed to be the forum conveniens, both because documents relating to the alleged licenses had their situs in Washington, D. C., and because certain apparently important witness were within the subpoena power of this court rather than that of the District Court for the Eastern Division of the Northern District of Ohio. The motion to transfer was denied, without prejudice to renewal upon a showing of changed conditions. See the transcript of hearing on July 6, 1961, and particularly the court's oral opinion, supplementary pages 1 to 5.

Defendant has renewed the motion to transfer, and has filed a further motion that in the alternative the United States be joined as a necessary, if not an indispensable, party defendant. The motion to transfer seeks to set up a change in circumstances through the discovery that various alleged witnesses to certain purported aspects of the claimed licenses (primarily with respect to parole interpretation; or variations of the terms thereof) may better be available in Ohio than in Maryland. The court is not

[1] The court has considered the supplementary memorandum of defendant, and the accompanying extensive exhibits.

persuaded that such alleged availability is critical. At the most, it becomes relevant only after a finding of validity and infringement.

Further, this court is completely unconvinced that a transfer would really conserve judicial manpower. Plaintiffs have consistently stated that if a transfer were made, they would oppose consolidation; they have, for the most part, refused to agree that discovery proceedings in the Cleveland cases may be used in this case; and it appears that this case, set firmly for trial on January 7, 1964 in this court will be reached, and (hopefully) will be decided before the Cleveland cases, which *may* be set for trial in April 1964, if the parties are then ready for trial. The motion to transfer is again denied.

As to the motion to make the United States a party, the court refers to the extended hearing on September 12, 1963, and the court's oral opinion, pages 59-60. Defendant seems to seek to do, indirectly, what this court found could not be done as a matter of law, or should not be permitted to be done as a matter of discretion.

The motion to make the United States a "necessary" party is likewise denied.

R. DORSEY WATKINS,
United States District Judge.

Dated: October 14, 1963.

Proceedings In Open Court

In the United States District Court
for the District of Maryland

No. 12932 Civil

The Firestone Tire & Rubber Company, and McCreary Tire & Rubber Company

vs.

General Tire & Rubber Company

Baltimore, Maryland
September 12, 1963

(The Court [J. Watkins]) I will deny the motion on two grounds, first, that the introduction of another party, whether the Government, or anyone else, at this stage of the case would almost certainly result in a very substantial delay in the trial, and the disposition of the case. And, secondly, the Court does not feel that the Government is a necessary party, as that term is used in the rule, and that it should not, by bringing the Government in, accomplish indirectly substantially that relief, substantially that which it refused to do in connection with Civil Action 14333. (pages 59-60.)

Proceedings In Open Court

In the United States District Court for the District of Maryland

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No. 12932 Civil

The Firestone Tire & Rubber Company, and McCreary Tire & Rubber Company,

vs.

General Tire & Rubber Company

Baltimore, Maryland
July 6, 1961

ORAL OPINION OF THE COURT

(Supplementary pages 1-5)

(The Court) Good afternoon.

I want to say I appreciate the diligence of counsel, both in the preparation of briefs and in oral argument. I studied the main briefs carefully shortly after their receipt, making notes of points and the major cases, and these briefs, with the reply briefs, were again reviewed last night, this morning and during lunch.

I further appreciate the importance of the disposition of these motions, to the parties, the attorneys, and perhaps to the District Courts of Maryland and Ohio.

The first question obviously is whether the Court, in the exercise of its discretion, shall entertain, or decline to entertain, the declaratory judgment suit. The Court sees no reason to dismiss a suit, timely filed, where it clearly has jurisdiction over the parties and the subject matter. Motion to dismiss is denied

The further discretionary question of transfer, vel non, is somewhat more difficult of disposition.

The Court is tempted to hold the matter sub curia, and dispose of it by a formal written opinion. This would have the merit, it is hoped, of preventing counsel from regretting, if not resenting, what they might think was a hasty decision. It also would, I hope, represent a literary improvement over this brief oral approach which is being taken.

However, the issues are clear, and their solution essentially factual, and the Court will probably never be more conversant with these facts than it now is.

Normally, where several cases are simultaneously pending involving substantially the same issues between the same or related parties, the case first filed should usually proceed in preference to the others, unless the circumstances are strongly in favor of the later ones, and this same approach is applicable to motions to transfer. The Court first acquiring jurisdiction should normally retain. In this case the facts and circumstances do not, in the Court's opinion, strongly favor, if they favor at all, a transfer.

That Cleveland, Ohio, would be somewhat more physically convenient to the defendant, and perhaps slightly more convenient to Firestone than Baltimore, may be true. This is primarily with respect to travel time, loss of working hours, and associated living expenses of witnesses. As to general counsel for plaintiffs and defendants, Maryland is somewhat more convenient, using the same criteria. This relatively slight convenience factor is not, in the Court's opinion, sufficient to make out a strong case for transfer.

On the other hand, plaintiffs claim, with certain plausibility, that on the contract question, and on the state of the art showing, that is, as to obviousness or lack thereof, proximity of Maryland to Washington where the R.F.C. files, perhaps in part classified, and to the Bureau of Standards, favor this district over Ohio. Likewise the presence within the subpoena power of this Court of at least four persons whose testimony may be important, is a factor in favor of retention of the case by this Court.

The Court does not anticipate an appreciable loss of judicial manpower time if the transfer is not made. The U. S. Tire Company and Goodrich Rubber Company cases have not been consolidated in Cleveland; in fact, no effort has been made to consolidate them; and the plaintiffs in the pending case say they would resist consolidation were there to be a transfer.

The parties by stipulation can agree that exhibits and depositions in the U. S. Tire and the Goodrich cases in Cleveland can be used in this case. This Court will recognize the calls on the time of counsel and will gladly cooperate with the preparation of a mutually agreeable time schedule.

In the exercise of its discretion, the Court denies the motion to transfer.

The infringement claims in General versus Firestone and General versus McCreary and Carroll, could and should, except as to Carroll, be pleaded by way of compulsory counterclaims in this suit. The prosecution of these suits will, therefore, be enjoined with leave at any time to apply for a dissolution of the injunction.

On the latter — off my notes now. It is possible that a change of condition could occur, that facts might develop which would lead to a different conclusion, and the Court does not feel it should attempt to forecast too far into the future. If the situation is unchanged, then the Court is firmly of the opinion that the two suits brought by General against the plaintiffs herein, and Carroll, ought to be handled by way of counter claims in the pending litigation. But, if there are changes of circumstances, or if it does not appear that the present suit is being prosecuted with diligence, or if it appears the suits in Cleveland can be disposed of with great celerity and complete satisfaction, then, perhaps, a different view should be taken.

Accordingly, the Court has not attempted to say, "enjoined until final disposition", whether that be by the District Court, by this District Court, the Fourth Circuit, this District Court and the Fourth Circuit, the Supreme Court, rehearing denied, petition to rehear rehearing denied, the

Court is not attempting to set any such notice, but will enjoin subject to leave to move at any time for a dissolution of the injunction.

I say again, I appreciate the efforts which counsel have displayed and I appreciate the care and thought they have given and the clarity of expression in both the memoranda and in the oral arguments.

It has been a pleasure to have you in the case.

ORDER OF COURT DENYING MOTION TO DISMISS AND MOTION TO TRANSFER AND GRANTING INJUNCTION

In the United States District Court
for the District of Maryland

Civil Action No. 12932

The Firestone Tire & Rubber Company, and McCreary Tire & Rubber Company,

Plaintiffs,

vs.

The General Tire & Rubber Company,

Defendant.

Motion of the Defendant to dismiss the above action, the motion of the Defendant to transfer the above action, and the motions of the Plaintiffs for injunctions having been read and considered, the briefs filed with the Court with respect to the said motions having been read and considered by the Court, and all of the parties having been fully heard with respect to the said motions, it is this 24th day of July, 1961, by the United States District Court for the District of Maryland,

ORDERED

1. That the motion of the Defendant, The General Tire & Rubber Company, to dismiss this proceeding be and the same hereby is denied.

2. That the motion of the Defendant, The General Tire & Rubber Company, to transfer this action to the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to §1404 (a) Title 28 United States Code, be and the same hereby is denied.

3. That the Defendant, The General Tire & Rubber Company, be and it hereby is enjoined, from prosecuting either in its own capacity or through the medium of any subsidiary or affiliated entity the proceedings instituted by the Defendant herein, The General Tire & Rubber Company, against The Firestone Tire & Rubber Company, in the United States District Court for the Northern District of Ohio, Eastern Division, designated therein as Civil Action No. 36799 and the proceedings instituted by the Defendant herein, The General Tire & Rubber Company, against McCreary Tire & Rubber Company and Carroll Tire, Inc., in the United States District Court for the Northern District of Ohio, Eastern Division, designated therein as Civil Action No. 36806, with leave, however: to the Defendant, The General Tire & Rubber Company to move at any time for a dissolution of the enjoining order hereby entered with respect to said proceedings and for such other and further relief as may be appropriate under the circumstances.

R. DORSEY WATKINS,
United States District Judge.

Approved as to form

BENJAMIN C. HOWARD,
Attorney for Plaintiffs,
THE FIRESTONE TIRE & RUBBER COMPANY
AND
MCCREARY TIRE & RUBBER COMPANY.

NORMAN P. RAMSEY,
Attorney for Defendant,
THE GENERAL TIRE & RUBBER COMPANY.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER CO., PETITIONER

v.

THE HONORABLE R. DORSEY WATKINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner asks this Court to review a decision of the court of appeals (see Pet. 4a–8a) upholding the district court's denial of petitioner's motions (1) to transfer to another district an action pending in the District of Maryland, and (2) to add the United States as a "necessary" party to that action, pursuant to Rule 19(b), F.R. Civ. P. Although we believe that the courts below were correct in their disposition of both motions, we limit our discussion here to the second motion, since it directly affects the interests of the United States.

The subject-matter of the underlying action dates back to the period during and following the Second World War, when the government con-

725-852—64

tracted with various rubber manufacturing companies, including petitioner, for the operation of government-owned synthetic rubber plants and for the conduct of synthetic rubber research. Pursuant to these contracts, the United States was given a royalty-free license in any resulting inventions and the right to nominate other licensees. Following the war, these plants were sold to private companies, and the purchasers were nominated licensees with respect to inventions developed under the various government research contracts, including the one held by petitioner.

In 1960, petitioner secured a patent on an alleged invention made during the term of its government research contract. It then brought a series of patent infringement actions against other rubber manufacturers in the United States District Court for the Northern District of Ohio (Civil Action Nos. 36564, 36565 and 36799). In addition, one of these companies filed a related declaratory judgment action against petitioner in the United States District Court for the District of Maryland (Civil Action No. 12932). The present proceeding arises out of this latter action.

At one stage of the Maryland proceeding (the suit against petitioner for a declaration of the invalidity or non-infringement of petitioner's patent), petitioner filed a motion to dismiss on the ground that the United States was an indispensable party. This motion was denied by the respondent District Judge on the ground that "the Court can determine whether or not the Plaintiffs or either of them have or has a royalty-free license in the United States without the joinder of the United States."

Petitioner thereafter filed an independent action against the United States in the District of Maryland (Civil Action No. 14333), purporting to sue the United States both in its own capacity and as representatives of a class composed of all government nominees claiming royalty-free licenses, for declaratory judgment as to the nonexistence of such licenses. The respondent judge granted the government's motion to dismiss this separate action, holding (1) that there was no justiciable controversy because the United States had never asserted or threatened to assert a license claim, and (2) that in any event the court would exercise its discretionary power to refuse to entertain a claim for declaratory relief since the private parties directly concerned had litigation pending against petitioner. Petitioner then filed a motion in the district court for rehearing and reconsideration.

Instead of awaiting the decision on its motion for rehearing and reconsideration and proceeding further, if necessary, in that case, petitioner then filed an additional motion in the District of Maryland Civil Action No. 12932, the earlier declaratory judgment action against it which it had unsuccessfully sought to dismiss on the ground that the United States was an indispensable party. In addition to renewing an earlier transfer motion, petitioner moved to join the United States as a "necessary" party pursuant to Rule 19(b), F.R. Civ. P. Respondent denied this motion both from the bench (Pet. 11a), and in a later memorandum opinion (Pet. 10a), holding that the

United States was not a "necessary" party to the action, as the term is used in Rule 19(b), and that in any event petitioner was merely attempting to circumvent the court's dismissal of its separate action against the United States (District of Maryland Civil Action No. 14333). Respondent also denied petitioner's transfer motion (Pet. 8a–10a).

Petitioner then sought review in the court of appeals by writ of mandamus, but the court refused to issue the writ (Pet. 4a–8a). In addition to upholding the respondent's refusal to transfer the case (Pet. 7a–8a), the court of appeals ruled that respondent had not abused the discretion conferred by Rule 19(b) in refusing to join the United States as a "necessary" party (Pet. 7a). It is from this determination that petitioner seeks to invoke this Court's power of review.

1. Confining ourselves to respondent's refusal to join the United States as a "necessary" party under Rule 19(b), it is clear that the decision below upholding that determination presents no question warranting further review by this Court. Rule 19(b) defines "necessary" parties as those who, although not indispensable, "ought to be parties if complete relief is to be accorded between those already parties." The determination as to whether full relief can be granted, and consequently whether a party is "necessary" or not, is, as the court of appeals correctly held, left to the discretion of the district court. Cf. *Janousek* v. *Wells*, 303 F. 2d 118, 122 (C.A. 8). That discretion was exercised here, and fully reviewed and confirmed

by the court of appeals.[1] No question of general or future significance is thus presented by the petition.

2. The decision below is also clearly correct. The United States has never had a direct or pecuniary interest in this complex patent litigation between private parties. Petitioner has sought as a matter of convenience, to maintain a so-called "class action" against the United States, apparently in hopes of avoiding the burdens of the several private suits in which it is involved. But the only connection of the government with this suit is the fact that the claims of the private parties have their origins in government contracts. If this were sufficient ground for joining the United States in private litigation, the government would find itself involved in a multitude of suits in which it has no pecuniary interest. The full answer to petitioner's argument is that the United States has neither an immediate or direct interest in the outcome, nor the power, as a party, to affect the relief finally accorded to the private parties.[2]

---

[1] We argued to the court of appeals that a refusal to issue the writ would be justified on the ground that Rule 19(b) motions, because addressed to the sound discretion of the district court, are not reviewable by mandamus. See *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26; *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420.

[2] There is no merit to the suggestion that the decision below is in conflict with settled law (Pet. 7–8). None of the cases cited by petitioner hold that a court of appeals *must* issue a writ of mandamus to compel a district court to join, as a "necessary" party, one whose presence the district court has determined is not necessary to accord complete relief between existing parties. *In re Conway*, 178 U.S. 421, 425, merely holds that a court of appeals *may* use the writ to compel a

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

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district court to exercise jurisdiction which the latter court mistakenly finds lacking; *Shields* v. *Barrow*, 17 How. 130, reiterates the truism that a court cannot act in the absence of *indispensable* parties; and in *Stevens* v. *Bartholomew*, 222 F. 2d 804, 806 (C.A. D.C.), the court of appeals merely held that a particular party was presumptively "necessary" to decision of the case. None of these cases is inconsistent in principle with the decision below.

Nor do we agree that the court of appeals erred in relying upon *Curacao Trading Co.* v. *Federal Ins. Co.*, 137 F. 2d 911, 911 (C.A. 2), certiorari denied, 321 U.S. 765. While the *Curacao* case apparently involved permissive joinder under Rule 20, rather than necessary joinder under Rule 19, the court below properly relied upon it in view of the broad discretion invested in the district court under both rules and the proper reluctance of the courts of appeals to disturb such determinations in the absence of an abuse of discretion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER COMPANY,
A Body Corporate, *Petitioner*,

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE FIRESTONE TIRE & RUBBER COMPANY AND McCREARY TIRE & RUBBER COMPANY AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER COMPANY,
A Body Corporate, *Petitioner*,

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company respectfully move for leave to file a brief as *amicus curiae* in opposition to the petition for writ of certiorari in this case.

This is a mandamus proceeding which arose out of Civil Action 12,932, *The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company* v. *The General Tire & Rubber Company*, pending in the United States District Court for the District of Maryland.

Amicus curiae are plaintiffs in Civil Action 12,932. *Amicus curiae* were intervenors in this mandamus proceeding before the appellate court.

Amicus curiae are the real adversary parties to the present action. The respondent District Judge is only a nominal adverse party.

Respondent is filing no brief in opposition to the petition for the writ of certiorari. Instead, respond-

ent is standing on the record and decisions below. Accordingly, unless the present motion is granted this court will have the benefit of no presentation by the real party in interest of the reasons why the petition should be denied.

Respondent has consented to the filing of an *amicus curiae* brief as proposed by this motion.

Petitioner has flatly refused to consent to the filing of the proposed *amicus curiae* brief. The obvious purpose of such refusal is to prevent the facts demonstrating why the petition should be denied from being presented to this Court.

Civil Action 12,932 is presently set for trial on April 15, 1964 subject only to the power of appellate courts to grant a stay. Respondent has stated unequivocally that no stay of the trial will be granted. The parties by stipulation have agreed to seek no further delay from respondent.

The petition is dilatory in character. Petitioner's *real purpose* is to force an adjournment of the April 15 trial date.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE OF THE FIRESTONE TIRE AND RUBBER COMPANY AND M CREARY TIRE AND RUBBER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This mandamus action arose out of Civil Action No. 12,932, *The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company* v. *The General Tire & Rubber Company*, pending in the United States District Court for the District of Maryland. Civil Action 12,932 is for a declaratory judgment of invalidity and non-infringement of patent 2,964,085.

Amicus curiae are plaintiffs in Civil Action 12,932. *Amicus curiae* were intervenors in this proceeding before the Appellate Court.

Amicus curiae pray that this Court issue no writ of certiorari to review the order denying mandamus entered by the United States Court of Appeals for the Fourth Circuit in this proceeding on January 7, 1964.

QUESTIONS PRESENTED

The *only* issue presented *to* the Fourth Circuit on mandamus was the propriety of certain *discretionary* orders by respondent. The *only* question which *can* be presented by this petition is whether the Appellate Court *erred in denying a writ of mandamus* to compel respondent to reverse his orders:

(1) Denying, *in his discretion*, a "renewed" motion to transfer Civil Action 12,932 in October of 1963 when the trial was set for January 7, 1964, *particularly when*

(a) Transfer had first been denied in July of 1961, and petitioner had made no effort to challenge the original transfer decision, but

rather had proceeded *for over two years* with exhaustive preparation for trial in respondent's Court;

(b) Petitioner, in January of 1963, indicated to respondent its desire and intention that the trial proceed in respondent's Court (R. App. II, Ex. C-2); and

(c) Petitioner, in January of 1963 selected respondent's Court as the most convenient in which to file Civil Action 14,333, a declaratory judgment action against the United States and a class including plaintiffs in Civil Action 12,932 involving the same license contracts and much of the same evidence as Civil Action 12,932, again emphasizing the propriety and petitioner's acceptance of the Baltimore forum.

(2) Refusing, *in his discretion*, to join the United States in Civil Action 12,932 under Rule 19(b), particularly when

(a) The United States does not manufacture tires or tread stock, has not been accused of infringement of and has never claimed a license under the patent involved in said civil action (R. Apps. III, Ex. E-3 and E-6, pp. 119-124);

(b) Respondent in April of *1962* had ruled that the Government was not an indispensable party to Civil Action 12,932 (Pet. 5a, R. App. II, Ex. B-5, pp. 66-67);

(c) Respondent on July 5, 1963 had dismissed Civil Action 14,333 brought by petitioner

against the United States for want of a justiciable controversy with respect to the same issue for which joinder of the United States in Civil Action 12,932 was sought (R. App. III, Ex. E-6, pp. 119-124);

(d) Respondent found as a basis for his refusal to join the United States that

> ". . . the Court does not feel that the Government is a necessary party, as that term is used in the Rule . . ." (Pet. 11a)

(e) Such joinder would materially delay the trial.

STATEMENT OF THE CASE

Petitioner is not interested in the merits of any question properly raised by this proceeding. Petitioner has failed in its efforts to transfer. It seeks to compensate for that failure by dilatory tactics designed to stall Civil Action 12,932, now set for trial April 15, 1964.

To that end petitioner has brought a motion in the Fourth Circuit seeking an order staying proceedings before respondent pending disposition of *this* petition. For the *same* purpose petitioner has filed a second petition for writ of mandamus in the court below. That second mandamus petition is based on an adverse ruling which petitioner knew would result from a tenuous issue first raised before respondent in January of 1964. Petitioner has stated that a second petition for writ of certiorari to the Fourth Circuit will be filed in this Court if the second mandamus petition is denied.

This entire series of appellate maneuvers is obviously an integral part of an over-all scheme of peti-

tioner to delay at all costs the trial and disposition of this action.

Civil Action 12,932 is a routine action for declaratory judgment of patent invalidity and noninfringement. The action arose in conventional manner. Petitioner, defendant in the declaratory judgment suit, is the owner of United States Patent 2,964,083 issued December 13, 1960. On the day the patent issued, petitioner sued Goodyear Tire & Rubber Company and United States Rubber Company in the Northern District of Ohio for patent infringement. Petitioner did not at that time file suit against *amicus curiae*, plaintiffs in Civil Action 12,932, namely, The Firestone Tire and Rubber Co. and McCreary Tire and Rubber Co. Petitioner did, however, charge that Firestone and McCreary were infringing its patent and threatened suit against them.

Because of petitioner's threats, *amicus curiae* jointly instituted Civil Action 12,932 in the Maryland District Court seeking a declaration under 28 U.S.C. 2201 that petitioner's Patent 2,964,083 is invalid and not infringed. As one ground of noninfringement, *amicus curiae* allege a license under Patent 2,964,083. *Amicus curiae* claim the license as nominees under a Government research contract pursuant to which petitioner granted a license to a United States agency and to its nominees.

Civil Action 12,932 was filed on March 30, 1961 in the Maryland District Court. Immediately thereafter, petitioner instituted separate infringement suits against both *amicus curiae* in the District Court for the Northern District of Ohio. In lieu of answer in Maryland, petitioner brought a motion to transfer or

alternatively to dismiss the Maryland action. *Amicus curiae* moved for an injunction against prosecution of the Ohio actions by petitioner. After extensive briefing of the motions and a hearing on July 6, 1961, respondent found that

> "In this case the facts and circumstances do not, in the Court's opinion, strongly favor, if they favor at all, a transfer."
>
> * * * * * * *
>
> "In the exercise of its discretion, the Court denies the motion to transfer.
>
> "The infringement claims in General v. Firestone and General v. McCreary and Carroll (in Ohio), could and should, except as to Carroll, be pleaded by way of compulsory counter-claims in this suit. The prosecution of these suits will, therefore, be enjoined with leave at any time to apply for dissolution of the injunction." (Pet. 13a-14a)

Petitioner did not seek review of this July 1961 ruling of respondent.

Instead, petitioner answered the Maryland declaratory judgment complaint and proceeded with the prosecution of the litigation in apparent good faith.

As early as July 16, 1962 respondent set a tentative trial date of October 1963 for the trial of Civil Action 12,962. (R. App. II, Ex. C-1).

In a letter to respondent dated January 3, 1963, counsel for petitioner stated:

> "Defendant joins with plaintiffs in requesting an early trial *at this court* on the issues of validity and infringement."

"I do not wish to start before Your Honor by asking for more time. It is rather my intention that the expression of Your Honor that the case be tried no later than October [1963] be fulfilled." (R. App. III, Ex. C-2)[1]

On January 4, 1963 petitioner instituted in the *Maryland* District Court, Civil Action 14,333 against the United States.[2] In that action petitioner sought a declaratory judgment that the United States *and its nominees* obtained no license under Patent No. 2,964,083. The United States promptly moved to dismiss Civil Action 14,333, *inter alia*, on the ground that no justiciable controversy existed between the parties. On July 5, 1963, after exhaustive briefing and a hearing, respondent granted the Government's motion to dismiss. On July 15, 1963 petitioner filed a request for rehearing (R. App. III, Ex. E-7). That request has been pending for some nine months with no effort to have it set down for hearing.

Instead, petitioner, on September 6, 1963, instituted in Civil Action 12,932 a motion to join the United States under Rule 19(b). At the same time petitioner brought an untimely renewed motion to transfer. Respondent, in his discretion, denied both motions on October 14, 1963.[3]

[1] Unless otherwise indicated, all emphasis is supplied.

[2] The facts surrounding the filing of the Government action are summarized in the opinion of the lower court and particularly in the first three paragraphs thereof. Pet. App. 5a; see also R. App. III, Ex. E.

[3] In the meantime, the trial date had been advanced to January 7, 1964 to accommodate respondent's docket.

Petitioner, on October 21, 1963, filed in the United States Court of Appeals for the Fourth Circuit a petition for writ of mandamus seeking review of respondent's discretionary denial of the "renewed" transfer and Rule 19(b) motions. It is the lower court's decision on that mandamus petition which gave rise to the present petition for writ of certiorari in this Court.

The Court of Appeals fully considered the complete record reflecting all of the relevant facts underlying the trial court's decision from which the mandamus petition was taken. As a result of such consideration, the Court of Appeals *denied mandamus* because there was no abuse of discretion by respondent on either the transfer or the Rule 19(b) issue.

With respect to transfer, the court below stated:

> "Finally, petitioner contends that the court has abused its discretion in refusing to transfer this case to Ohio under 28 U.S.C. § 1404(a) . . . we have no hesitation in saying that on the state of this record we will not issue a mandamus here." (Pet. 7a-8a).

On the Rule 19(b) issue, the court below held:

> "Petitioner's argument that Rule 19(b) leaves no discretion in the trial court to determine whether the United States was in this case a necessary party is likewise without merit . . . we find no such abuse of that discretion as would justify mandamus." (Pet. 7a)

It is these *discretionary* rulings of respondent, and *only* these *discretionary* rulings, which petitioner asks this Court to review.

ARGUMENT

Petitioner's Points 1, 2 and 5

Each of the self-serving generalities advanced by petitioner in its points 1, 2 and 5 is founded upon a false premise. None is worthy of the attention of this Court.

The granting of this petition would be squarely *inconsistent* with sound principles of judicial administration. Respondent's *discretionary* rulings are based upon the particular circumstances of Civil Action 12,932. They are in strict accord with all relevant precedent. There is no conflict. The decision below presents no problem with respect to "the administration of the Federal Courts" (Point 1) or "the Patent Laws of the United States" (Point 5).

The principles *here* controlling—and followed by respondent—were delineated by this Court in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 185, 96 L. Ed. 200, 203, 204 (1952). In that case this Court said:

> "The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, *an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.*

> "The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the courthouse, not a headstart. If he is forehanded, subsequent suits against him by the patentee can *within the trial court's discretion* be enjoined pending determination of the declaratory judgment suit, and a judgment in his favor bars suits against his customers."

Respondent in this action is a "disciplined and experienced" trial judge. Plaintiffs in Civil Action 12,932 were "forehanded" in 1961. Respondent, at *that* time, following the *Kerotest* mandate, enjoined belated compulsory counterclaim actions filed in Cleveland against plaintiffs in Civil Action 12,932 and refused to transfer. The case then proceeded for *over two* years in respondent's Court. Twice during that period petitioner indicated its acceptance of the Baltimore forum.

In denying the *renewed* transfer motion in October of 1963, respondent *again* exercised discretion in strict accordance with *Kerotest*. He refused, on the eve of trial, after exhaustive discovery pursuant to ground rules which he had delineated, to transfer Civil Action 12,932 to a forum generally unfamiliar with the case. Any other order would have resulted in an absurd and needless waste of judicial resources, substantial trial delay, and in gross injustice to *amicus curiae*.

As the court below noted, at the time the "*renewed*" transfer motion was denied by respondent in October of 1963:

> "... There is no evidence that the Ohio case can be reached at a substantial time in the future. Whereas

> this case is set for a firm date early next year.[1] The Court is thoroughly familiar with the issues. More than 25,000 pages of depositions and 18,000 pages of exhibits are in the record. Plaintiffs have been required to answer over 600 interrogatories. This work has proceeded under ground rules laid down by the district judge, who in ten full days of hearing must have acquired familiarity with the details of the case."[2]

Subsequent to January 7, 1964, the date of the decision below, respondent has conducted *at least nine additional* full days of hearing in open court in the nature of a pretrial proceeding and for the purpose of disposing of all outstanding discovery matters. The record of that pretrial hearing exceeds 1200 pages in length.[3]

A total of over *2200* interrogatories have now been responded to by both parties to Civil Action 12,932.

The trial date is now set for April 15, 1964. Respondent has stated unequivocally that *no* adjournment or stay of the trial will be *granted*. The parties have stipulated that no further delays in the trial will be *sought* from respondent.[4]

Wise judicial administration counsels against this Court's displacing with its own the judgment of respondent and of the court below.

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[1] The trial was then set for February 3, 1964.

[2] The pretrial hearing was held during the week of January 20-24, 1964 and during the week of March 23-28, 1964. The latter hearing was in progress at the time this brief was printed.

[3] The real purpose of this petition is to obtain such a stay—not to present any important question to this Court.

Far from an *abuse* of the Declaratory Judgments Act, this case is a prime example of the very type of action for which that act was designed. Firestone and McCreary are entitled to test the legitimacy of the charges of infringement leveled against them in a reasonable forum of their *own* choice. 28 U.S.C. 1404(a) did not amend 28 U.S.C. 2201 to restrict a declaratory judgment plaintiff's choice of forum to that previously selected by the patentee for infringement suits against third parties. The pendency of the Cleveland suits does not foreclose the exercise of discretion by respondent to deny transfer in the light of *all* relevant factors.

The belatedly *renewed* transfer motion which is the subject of the present petition was not brought until the action had been pending for almost two and one-half years, extensive discovery and pretrial proceedings had been conducted and the case was on the eve of trial. Petitioner has cited and *amicus curiae* are aware of no analogous case in which transfer has even been suggested.

Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 4 L. Ed. 2d 1540 (1960), is wholly inapposite.

In that case, the *discretionary* rulings of the trial judge were not challenged.

Continental was an admiralty case brought in New Orleans against a *vessel*. Transfer was sought to Memphis, Tennessee, where the same issue was involved in a case *already tried* against the *owner* of the vessel. The *vessel* itself could not have been sued in Memphis.

The *sole* issue before this Court was whether transfer was foreclosed as a matter of law by 28 U.S.C.

1404(a) as construed by this Court in *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L. Ed. 2d 1254 (1960). This Court's findings (Pet. 6) were premised upon its repudiation for the purposes of transfer motions of "a long standing admiralty fiction that a vessel may be assumed to be a person."

To the extent that *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 91 L. Ed. 1055 (1947) and *Kochring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (5th Cir. 1963), cited by petitioner (Point 2), are pertinent they support denial rather than granting of the petition.

In *Gulf Oil*, a *forum non conveniens* case, this Court upheld the trial court's *discretion* and emphasized the importance of the latter's consideration of *all* relevant factors. Respondent's decisions denying transfer in 1961 and 1963 were based on a discretionary consideration of all relevant factors.

Kochring was an appeal. It was not a mandamus action. The *facts* in *Kochring* were fundamentally different than in Civil Action 12,932. Transfer was not sought on the eve of trial. *Kochring* had not proceeded for two and one-half years in the transferor court. The party seeking transfer had *not* repeatedly indicated its approval of the original forum *before* the transfer was sought.

Spurious Venue and Jurisdiction Issues—Petitioner's Point 3

In connection with its "renewed" transfer motion in 1963, petitioner for the first time belatedly challenged venue. *If there had been a defect in venue, it had long before been waived.*

Moreover, venue was obviously proper *ab initio*. Civil Action 12,932 is a declaratory judgment action—

not "a patent infringement case."[7] Venue is controlled by 28 U.S.C. 1391(c)—not 28 U.S.C. 1400(b). Petitioner itself admitted as much at the time the *first* transfer motion was decided in July of 1961.[8]

In affirming respondent's ruling on venue, the court below joined every other court of appeals which has passed on the issue. The court said:

> ". . . In a declaratory judgment action alleging invalidity and noninfringement venue jurisdiction is controlled by 28 U.S.C. § 1391(c) and not by 28 U.S.C. § 1400(b). The overwhelming weight of authority is to this effect. *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F. 2d 774 (6 Cir. 1957); *Crosley Corp. v. Westinghouse Elec. & Mfg. Co.*, 130 F. 2d 474 (3 Cir. 1942); *E. I. duPont de Nemours & Co. v. Byrnes*, 101 F. 2d 14 (2 Cir. 1939) . . . ." (Pet. 7a)

If this were *not* the law, any question of transfer would be foreclosed because this action could not have been brought against plaintiff McCreary in the Northern District of Ohio, where McCreary has no "regular and established place of business" as required by 28 U.S.C. § 1400(b). *See Hoffman v. Blaski*, 363 U.S. 335, 4 L. Ed. 2d 1254 (1960).

[7] Petitioner is forced to erroneously characterize this declaratory judgment action as "a patent infringement case" (Pet. 6) to argue the applicability of 1400(b) rather than 1391(c).

[8] In July of 1961 at the first transfer hearing before respondent counsel for petitioner distinguished this case from a "patent infringement suit" as follows:

> "This, however, your Honor, is a declaratory judgment suit. It is not bound by the Lummus decision at all. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 1 L. Ed. 2d 786 (1957). The venue is established by the general corporate venue. . . ." (R. App. I, Ex. A-7, p. 28)

There is no conflict either in decision or in principle between the consistent authority of the Courts of Appeal on this venue issue and the decisions of this Court in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 1 L. Ed. 2d 786 (1957), and *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 5 L. Ed. 2d 546 (1961). These cases are not in point. They concern venue in "patent infringement actions" brought by the *patentee* against the accused *infringer*. They have nothing to do with venue in declaratory judgment cases.

There was no venue issue in *Dresser Industries, Inc.* v. *Smith-Blair, Inc.*, 322 F. 2d 878 (9th Cir. 1963) cited by petitioner.

Petitioner advances a specious jurisdictional argument citing two licensee estoppel cases, *Bowers Mfg. Co.* v. *All-Steel Equipment Inc.*, 275 F. 2d 809 (9th Cir. 1960) and *Foster Wheeler Corp.* v. *Furnace Engineering Co.*, 46 F. Supp. 867 (S.D.N.Y. 1942). (Pet. 7). The court below disposed of this contention as follows:

> "... Petitioner argues that the plaintiffs' pleading of a license estops them to attack the validity of the patent and, therefore, removes the case from the area of patent litigation into the area of contract, thus requiring diversity between the parties for federal jurisdiction. This argument might bear considerable weight but for the fact that the defendant-petitioner denies the existence of a license. Under these circumstances, we seriously doubt that the doctrine of licensee-estoppel applies. Davis v. Buck-Jackson Corp., 230 F. 2d 655, 657 (4 Cir. 1956)." (Pet. 6a-7a)

The ruling of the court below is the only ruling possible consistent with good law and common sense. There is no conflicting authority.

Petitioner's Point 4

The ruling below that the trial court did not abuse discretion in refusing to join the Government under Rule 19(b) does *not conflict* with any case cited by petitioner.

The Appellate Court below properly disposed of the matter as follows:

> ". . . The court in effect held adversely to petitioner on its Rule 19(b) motion to make the United States a party in April of 1962 when it held that the United States was not an indispensable party to this suit and again by inference when it dismissed petitioner's separate suit against the United States on the grounds that no justiciable controversy existed between the petitioner and the Government. Now that an extensive amount of discovery has been completed and a firm date fixed for trial of the case on the merits petitioner labors under a difficult burden. . . ."
>
> * * * * *
>
> "Petitioner's argument that Rule 19(b) leaves no discretion in the trial court to determine whether the United States was in this case a necessary party is likewise without merit. Had the court found the United States to be a necessary party in order to accord complete relief to those already parties then, of course, no discretion is left in the court but to join under the terms of the statute. But, the preliminary question is clearly within the discretion of the court, and at this stage of the proceeding we find no such abuse of that discretion as would justify mandamus: *Curacao Trading Co. v. Federal Ins. Co.*, 137 F. 2d 911, 914 (2 Cir. 1943), cert. denied 321 U.S. 765 (1944)." (Pet. 5a-7a)

Rule 19(b) provides:

"(b) Effect of Failure to Join. When persons who are not indispensable, *but who ought to be parties if complete relief is to be accorded between those already parties*, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. . . ."

The "preliminary question . . . clearly within the discretion of the court" to which the decision below refers is, of course, the question implicit in the underlined portion of the rule.

In holding this matter to be discretionary, the court below was consistent with precedent. There is no conflict. There is no reason to grant the present petition.

Petitioner's cases are inapposite.

Ex Parte *Conroicay*, 178 U.S. 421, 44 L. Ed. 1134 (1900), involved a question of jurisdiction over a party—not a determination as to whether the party was necessary.

In *Shields* v. *Barrow*, 17 How. 130, 15 L. Ed. 158 (1855) the Court held that a case should not proceed in the absence of *indispensable* parties.

In *Stevens* v. *Bartholomew*, 222 F. 2d 804 (D.C. Cir. 1955), there was no ruling on the discretion of the lower court to determine whether a party is necessary.

CONCLUSION

No basis for the grant of a writ of certiorari has been advanced. Petitioner merely seeks a delay of the trial. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 878

THE GENERAL TIRE & RUBBER COMPANY,
A BODY CORPORATE,
Petitioner,

v.

THE HONORABLE R. DORSEY WATKINS,
UNITED STATES DISTRICT JUDGE FOR THE
DISTRICT OF MARYLAND,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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REPLY TO MEMORANDUM FOR THE UNITED STATES

The United States says that the only connection of the Government with this suit is the fact that the claims of the private parties have their origins in Government contracts (Mem. p. 5). This is not correct.

The United States has a *present* and *continuing* interest with respect to this suit. The United States has expressly reserved the right to make *further* nominations with respect to Petitioner's research contracts. (Mandamus Respondent's App. Exhibit E, 7. Beale Affidavit, Exhibit "g").

The United States has *refused* to state that it will not make further nominations.

The claim that this is a private litigation is completely contrary to the *actions* of the United States in the past. In 1957 it sued *The B. F. Goodrich Company* for a declaratory judgment that the United States (and its nominees) were licensed to certain Goodrich inventions pursuant to research contracts of the *same general nature* as Petitioner's in this suit (Mandamus Respondent's App. Exhibit E. 7, Beale Affidavit, Exhibit "b"). Petitioner is fearful that the Government will do the very same thing after Petitioner wins in this case. The Government has refused to say that it will not do to Petitioner what it did to Goodrich.

The United States is correct when it claims that Petitioner hopes to avoid the burdens of several private suits (Mem. p. 5). Petitioner believes this fact clearly shows the merit of its request for joinder of the United States. The avoidance of a multiplicity of suits has always been considered a good purpose to be served by enlightened rules of civil procedure.

The joinder of the United States will permit Petitioner to strike at the source of the claims of license. It will stop all further threats on behalf of the United States that it has reserved the power to license Petitioner's patent. It will remove a cloud from Petitioner's patent and it will prevent the rise of future nominees claiming to be licensed through the United States.

Petitioner seeks to put an end to litigation. The United States wants to leave the matter unresolved subject to future litigation. The United States has two choices. It should state that it will make no future claim to license

of Petitioner's invention or it should join and litigate the matter.

Its refusal to make this reasonable choice has required Petitioner to bring a Motion for mandatory joinder under Rule 19(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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Attorney for Petitioner.

CHARLES J. MERRIAM,
Of Counsel.

April, 1964.

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Petitioner objects to the filing of a brief by the Firestone Tire & Rubber Company and McCreary Tire & Rubber Company, as *amici curiae*. The Motion is clearly tardy.

Amici curiae were served with the Petition as far back as February 21, 1964. *Amici curiae* knew that a trial date was set by Respondent for Civil Action 12,932 to commence on April 15, 1964.

Amici curiae could have filed their two page Motion long before they did. Instead they waited over thirty days from the time of service upon them of the Petition.

The Supreme Court Rules do not permit The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company to appear as *amici curiae*. They intervened as parties in the Fourth Circuit Court of Appeals. They were served with a copy of the Petition for Certiorari. They are not "friends of the court" but are in fact *party litigants*.

In their efforts to delay as long as possible, *amici curiae* apparently overstepped themselves and missed the March 23 filing date for *party litigants*. Now they want to change themselves into "friends of the court" in order to permit the filing of briefs which the Rules would otherwise prohibit.

Significantly, the Respondent District Judge has not filed an opposing brief although represented by counsel who also represent *amici curiae*. His counsel has not even filed a statement that Respondent does not wish to file an opposing brief. If such statement had been forthcoming promptly after the filing of the Petition, considerable delay would have been avoided.

The intentions of *amici curiae* are obvious. They want to delay the consideration of the Petition for Certiorari until *after* April 15, 1964. They want to delay matters in this Court as much as possible to permit the trial of Civil Action 12,932 to start before Petitioner's cause is considered in this Court. They should not be permitted to delay matters in order to prevent a full consideration of the Petition for Certiorari on the merits.

For these reasons, we earnestly request that the Motion for leave to file brief on behalf of *amici curiae* be denied.

Respectfully submitted,

NORMAN P. RAMSEY,
Attorney for Petitioner.

CHARLES J. MERRIAM,
Of Counsel.

April, 1964.